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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 EASTERN DIVISION
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12 JOSE FRANCISCO OCHOA,) No. EDCV 08-1858 CW
13)
14 Plaintiff,) DECISION AND ORDER
15 v.)
16)
17 MICHAEL J. ASTRUE,)
18 Commissioner, Social)
19 Security Administration,)
20)
21 Defendant.)
22 _____)
23

24 The parties have consented, under 28 U.S.C. § 636(c), to the
25 jurisdiction of the undersigned magistrate judge. Plaintiff seeks
26 review of the denial of disability benefits. The court finds that
27 judgment should be granted in favor of defendant, affirming the
28 Commissioner's decision.

24 I. BACKGROUND

25 Plaintiff Jose Francisco Ochoa was born on February 13, 1954, and
26 was fifty-three years old at the time of his administrative hearing.
27 [Administrative Record ("AR") 18, 96.] He has twelve years of
28 education and no past relevant work. [AR 15.] Plaintiff alleges

1 disability on the basis of hepatitis C and stomach ulcers. [AR 34.]

2 **II. PROCEEDINGS IN THIS COURT**

3 Plaintiff's complaint was lodged on December 15, 2008, and filed
4 on December 26, 2008. On June 22, 2009, Defendant filed an answer and
5 Plaintiff's Administrative Record ("AR"). On August 26, 2009, the
6 parties filed their Joint Stipulation ("JS") identifying matters not
7 in dispute, issues in dispute, the positions of the parties, and the
8 relief sought by each party. This matter has been taken under
9 submission without oral argument.

10 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

11 Plaintiff applied for supplemental security income ("SSI") under
12 Title XVI of the Social Security Act on May 19, 2006, alleging
13 disability since January 1, 2004. [AR 96.] After the application was
14 denied initially and on reconsideration, plaintiff requested an
15 administrative hearing, which was held on January 24, 2008, before
16 Administrative Law Judge ("ALJ") Barry S. Brown. [AR 18.] Plaintiff
17 appeared with counsel and gave testimony. [AR 19.] The ALJ denied
18 benefits in a decision issued on March 20, 2008. [AR 11-17.] When
19 the Appeals Council denied review on October 31, 2008, the ALJ's
20 decision became the Commissioner's final decision. [AR 1-3.]

21 **IV. STANDARD OF REVIEW**

22 Under 42 U.S.C. § 405(g), a district court may review the
23 Commissioner's decision to deny benefits. The Commissioner's (or
24 ALJ's) findings and decision should be upheld if they are free of
25 legal error and supported by substantial evidence. However, if the
26 court determines that a finding is based on legal error or is not
27 supported by substantial evidence in the record, the court may reject
28 the finding and set aside the decision to deny benefits. See Aukland

1 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
2 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
3 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
4 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
5 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
6 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

7 "Substantial evidence is more than a scintilla, but less than a
8 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
9 which a reasonable person might accept as adequate to support a
10 conclusion." Id. To determine whether substantial evidence supports
11 a finding, a court must review the administrative record as a whole,
12 "weighing both the evidence that supports and the evidence that
13 detracts from the Commissioner's conclusion." Id. "If the evidence
14 can reasonably support either affirming or reversing," the reviewing
15 court "may not substitute its judgment" for that of the Commissioner.
16 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

17 **V. DISCUSSION**

18 **A. THE FIVE-STEP EVALUATION**

19 To be eligible for disability benefits a claimant must
20 demonstrate a medically determinable impairment which prevents the
21 claimant from engaging in substantial gainful activity and which is
22 expected to result in death or to last for a continuous period of at
23 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
24 721; 42 U.S.C. § 423(d)(1)(A).

25 Disability claims are evaluated using a five-step test:

26 Step one: Is the claimant engaging in substantial
27 gainful activity? If so, the claimant is found not
28 disabled. If not, proceed to step two.

Step two: Does the claimant have a "severe" impairment?
If so, proceed to step three. If not, then a finding of not

disabled is appropriate.

Step three: Does the claimant's impairment or combination of impairments meet or equal an impairment listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If so, the claimant is automatically determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past work? If so, the claimant is not disabled. If not, proceed to step five.

Step five: Does the claimant have the residual functional capacity to perform any other work? If so, the claimant is not disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or "not disabled" at any step, there is no need to complete further steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

Claimants have the burden of proof at steps one through four, subject to the presumption that Social Security hearings are non-adversarial, and to the Commissioner's affirmative duty to assist claimants in fully developing the record even if they are represented by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at 1288. If this burden is met, a prima facie case of disability is made, and the burden shifts to the Commissioner (at step five) to prove that, considering residual functional capacity ("RFC")¹, age, education, and work experience, a claimant can perform other work

¹ Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to work without directly limiting strength, and include mental, sensory, postural, manipulative, and environmental limitations. Penny v. Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a nonexertional limitation. Penny, 2 F.3d at 959; Perminster v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 which is available in significant numbers. Tackett, 180 F.3d at 1098,
2 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

3 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

4 Here, the ALJ found that Plaintiff had not engaged in substantial
5 gainful activity since May 19, 2006, the filing date of Plaintiff's
6 Title XVI application (step one); that Plaintiff had "severe"
7 impairments, namely hypertension, history of hepatitis C and history
8 of polysubstance abuse (step two); and that Plaintiff did not have an
9 impairment or combination of impairments that met or equaled a
10 "listing" (step three). [AR 13.] The ALJ determined that Plaintiff
11 had an RFC for the full range of medium work. [Id.] Plaintiff had no
12 past relevant work (step four). [AR 15.] Based on application of Rule
13 203.21 of the Medical-Vocational Guidelines, it was determined that
14 Plaintiff could perform work existing in significant numbers in the
15 national economy (step five). [AR 16.] Accordingly, Plaintiff was
16 found not "disabled" as defined by the Social Security Act. [Id.]

17 **C. ISSUES IN DISPUTE**

18 The parties' Joint Stipulation identifies the following disputed
19 issues:

- 20 1. Whether the ALJ properly considered the Plaintiff's
21 testimony regarding his alleged memory problems and severe
22 depression;
- 23 2. Whether the ALJ properly considered the Plaintiff's
24 testimony regarding his alleged inability to read, write,
25 speak or understand English;
- 26 3. Whether the ALJ properly considered the consultative
27 examiner's opinion; and
- 28 4. Whether the ALJ should have obtained vocational expert

1 testimony.

2 [JS 2-3.]

3 **D. ISSUE ONE: DEPRESSION AND MEMORY PROBLEMS**

4 In the first claim, Plaintiff asserts that the ALJ did not
5 properly consider Plaintiff's testimony regarding his memory problems
6 and severe depression. [JS 3-5.] At the administrative hearing,
7 Plaintiff testified, among other things, that he is depressed
8 "sometimes," and that this condition is severe. [AR 25.] Plaintiff
9 also testified that he has troubles with his memory and difficulty
10 with concentration. [Id.]

11 The ALJ did not reference this portion of Plaintiff's testimony
12 in the administrative decision but noted that Plaintiff "has offered
13 little objective medical evidence of a medically determinable
14 impairment or impairment related limitations." [AR 14.] The ALJ also
15 determined, based on a number of reasons including inconsistencies in
16 the Plaintiff's testimony, that Plaintiff's testimony "although
17 appearing sincere, is not fully credible" regarding his symptoms and
18 functional limitations. [Id.] Plaintiff asserts that this
19 determination constituted reversible error because it was not
20 "sufficiently specific" as to Plaintiff's allegations of depression
21 and memory problems. [JS 3-5.]

22 The appropriate standard in the Ninth Circuit for evaluations of
23 subjective symptom testimony in Social Security disability cases
24 requires, first, that the claimant produce medical evidence of an
25 underlying impairment which is reasonably likely to be the cause of
26 the alleged symptom; when this evidence is produced, the Commissioner
27 may not reject a claimant's credibility without specifically making
28 findings which support this conclusion. Bunnell v. Sullivan, 947 F.2d

1 341, 345 (9th Cir. 1991)(en banc)(affirming standard of Cotton v.
2 Bowen, 799 F.2d 1403, 1407 (1986), for review of ALJ evaluations of
3 pain and subjective symptom testimony). The credibility determination
4 must state "clear and convincing" reasons that includes a specific
5 statement of which symptom testimony is not credible and what facts in
6 the record lead to that conclusion. Smolen v. Chater, 80 F.3d 1273,
7 1284 (9th Cir. 1996)(citing Dodrill v. Shalala, 12 F.3d 915, 918 (9th
8 Cir. 1993)); see also Lester v. Chater, 81 F.3d at 834 ("For the ALJ
9 to reject the claimant's complaints, [the ALJ] must provide specific,
10 cogent reasons for the disbelief").

11 Here, Plaintiff's assertion that the ALJ's evaluation of the
12 hearing testimony was not sufficiently specific regarding Plaintiff's
13 statements regarding his depression and memory problems lacks merit
14 because Plaintiff did not satisfy the initial requirement of producing
15 medical evidence of an underlying impairment to warrant such an
16 evaluation. As the ALJ correctly noted, the record contains almost no
17 objective medical evidence of a medically determinable impairment or
18 impairment related limitation. The record does not indicate that
19 Plaintiff was diagnosed with or sought treatment for depression or
20 memory problems, and Plaintiff's subjective complaints by themselves
21 were insufficient to warrant further analysis. See Bunnell v.
22 Sullivan, 947 F.2d at 347 ("We rejected the claims for disability
23 because the claimant failed to produce medical evidence of an
24 underlying impairment . . . [although] the pain need not be
25 corroborated by objective medical findings, . . . some impairment must
26 be medically ascertained.")(citations omitted). Accordingly, this
27 claim provides no grounds to reverse the ALJ's decision.
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1 **E. ISSUE TWO: LACK OF ENGLISH PROFICIENCY**

2 In the second claim for relief, Plaintiff asserts that the ALJ's
3 finding as to Plaintiff's ability to read, write, speak or understand
4 English was based on unsupported opinions and assumptions. [JS 10-12.]
5 The record indicates that, as part of his disability application,
6 Plaintiff stated that he does not speak and understand English, and
7 that his preferred language was Spanish. [AR 104.] At the hearing, a
8 Spanish-language interpreter was available. [AR 20.] During
9 Plaintiff's testimony, however, the ALJ made the observation that
10 Plaintiff was speaking English, and Plaintiff replied that "I
11 understand it." [AR 29.]

12 In the administrative decision, the ALJ determined that Plaintiff
13 "is at least able to communicate in English and/or has basic English
14 skills." [AR 16.] In support of this finding, the ALJ noted that
15 Plaintiff had lived in the United States for almost forty years, that
16 he had worked for many years,² that it was "improbable that he is not
17 at least able to communicate in English," and that at the hearing,
18 Plaintiff did not deny that he could communicate in English, but only
19 stated that he had problems. [Id.] Plaintiff contends that evidence
20 of Plaintiff's lack of English proficiency "has significant
21 ramifications for his vocational base," that the ALJ's finding is
22 "speculative," and that the evaluation does not meet the Ninth Circuit
23 standard for credibility determinations. [JS 10-12.]

24 Plaintiff's assertions are without merit. The ALJ provided
25 specific, cogent reasons for disregarding Plaintiff's claim that

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27 ² Although the ALJ found that Plaintiff had no past relevant
28 work as defined by the Act (20 C.F.R. § 416.965), Plaintiff reported
in his application that he worked as a painter in the construction
industry from 1982 to 1987. [AR 16, 106.]

1 satisfied the Bunnell standard above. The record supports the ALJ's
2 determination that it was improbable that Plaintiff lacked basic
3 English skills based on factors such as Plaintiff's lengthy residence
4 in the United States, his work history, and his statements at the
5 hearing. Moreover, Plaintiff's assertion that lack of proficiency in
6 English "has significant ramifications for his vocational base" is
7 incorrect. The ALJ's application of the Medical-Vocational Guidelines
8 to determine whether Plaintiff could perform work existing in
9 significant numbers in the national economy, based on undisputed
10 factors such as Plaintiff's age and exertional ability, directed a
11 finding of non-disability at all levels of English proficiency. See
12 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table No. 3. Accordingly, this
13 claim must be denied.

14 **F. ISSUE THREE: CONSULTATIVE EXAMINER'S OPINION**

15 In Claim Three, Plaintiff asserts that the ALJ "merely
16 summarized" the opinion of an examining physician, Dr. Rocely Ella-
17 Tamayo, but "failed to explain whether he accepted or rejected it."
18 [JS 14.] In an internal medicine examination conducted on December
19 28, 2006, Dr. Tamayo made the following functional assessment:

20 The claimant is restricted in pushing, pulling, lifting, and
21 carrying to about 50 pounds occasionally and about 25 pounds
22 frequently. Sitting is unrestricted. In terms of standing and
23 walking, the claimant is able to stand and walk 6 hours out of an
24 8-hour workday with normal breaks. He is able to kneel without
25 restrictions, squat occasionally because of alleged left groin
26 discomfort. There is no functional impairment observed on both
27 hands.

28 [AR 172.]

1 In the administrative decision, the ALJ described Dr. Tamayo's
2 evaluation but did not explicitly state whether it was rejected or
3 accepted. [AR 15.] However, the ALJ found that Plaintiff had an RFC
4 for "the full range of medium work," which was wholly consistent with
5 Dr. Tamayo's opinion. [AR 13.] Although Dr. Tamayo's opinion was not
6 favorable to Plaintiff's claim, Plaintiff appears to assert that a
7 portion of the opinion, stating that Plaintiff could stand and walk
8 six hours out of an eight-hour workday with normal breaks, reflected
9 an erosion of Plaintiff's ability to perform a full range of medium
10 work that was not properly developed as an issue. [JS 16.] However,
11 the Commissioner's standard definition of medium work includes an
12 ability to stand and walk within limits identical to those expressed
13 in Dr. Tamayo's opinion. Social Security Ruling ("SSR") 83-10, 1983
14 WL 31251 at *6 ("A full range of medium work requires standing or
15 walking, off and on, for a total of approximately 6 hours in an 8-hour
16 workday in order to meet the requirements of frequent lifting or
17 carrying objects weighing up to 25 pounds"). Accordingly, this claim
18 is without merit.

19 **G. ISSUE FOUR: VOCATIONAL EXPERT TESTIMONY**

20 In the final claim, Plaintiff asserts that, in light of his non-
21 exertional limitations, such as his depression, limited education,
22 lack of proficiency in English, and symptoms of Hepatitis C, the ALJ
23 erred by not obtaining the testimony of a vocational expert at the
24 hearing before finding Plaintiff not disabled. [JS 17.]

25 At step five of the five-step disability evaluation, the burden
26 shifts to the Commissioner to prove that the claimant is capable of
27 engaging in other jobs that exist in substantial numbers in the
28 national economy. Valentine v. Commissioner Social Sec. Admin., 574

1 F.3d 685, 689 (9th Cir. 2009). There are two ways for the
2 Commissioner to meet this burden: (1) by the testimony of a vocational
3 expert or (2) by reference to the Medical-Vocational Guidelines
4 ("grids"). Bray v. Commissioner of Social Security Admin., 554 F.3d
5 1219, 1223 n. 4 (9th Cir. 2009)(citing Tackett v. Apfel, 180 F.3d
6 1094, 1099 (9th Cir. 1999)). The grids are "predicated on a claimant
7 suffering from an impairment which manifests itself by limitations in
8 meeting the strength requirements of jobs ('exertional limitations');
9 they may not be fully applicable where the nature of a claimant's
10 impairment does not result in such limitations ('non-exertional
11 limitations')." Lounsberry v. Barnhart, 468 F.3d 1111, 1115 (9th Cir.
12 2006). The Commissioner's need for efficiency justifies use of the
13 grids at step five, but only when the grids "completely and accurately
14 represent a claimant's limitations." Widmark v. Barnhart, 454 F.3d
15 1063, 1069 (9th Cir. 2006); Moore v. Apfel, 216 F.3d 864, 869 (9th
16 Cir. 2000); Tackett v. Apfel, 180 F.3d at 1101 ("In other words, a
17 claimant must be able to perform the full range of jobs in a given
18 category").

19 "Significant non-exertional impairments . . . may make reliance
20 on the grids inappropriate" and require the testimony of a vocational
21 expert. Id., 180 F.3d at 1101-02. The non-exertional limitation must
22 be "sufficiently severe so as to significantly limit the range of work
23 permitted by the claimant's exertional limitations." Hoopai v.
24 Astrue, 499 F.3d 1071, 1076 (9th Cir. 2007)(quotation omitted). For
25 example, "the severity of the limitations at step five that would
26 require use of a vocational expert must be greater than the severity
27 of impairments determined at step two." Id. (recognizing that step two
28 requires a lower showing of severity than step five and therefore, a

1 finding at step two that an impairment is severe does not necessarily
2 require that the ALJ seek assistance of vocational expert at step
3 five). "Thus, built into the step-five determination and the grids is
4 recognition that the claimant has met the threshold requirement for a
5 severe disability at step two." Id.

6 In this case, the record does not contain evidence of a
7 significant non-exertional limitation that made reliance on the grids
8 inappropriate and required the testimony of a vocational expert. As
9 noted initially, the ALJ's step two finding did not include a finding
10 that Plaintiff's alleged depression, memory or language problem was a
11 severe impairment, which Plaintiff does not dispute here. Because
12 Plaintiff did not make a threshold showing that these asserted non-
13 exertional impairments were severe at step two of the five-step
14 inquiry, such limitations are not "sufficiently severe" to require
15 vocational expert testimony at step five. Id., 499 F.3d at 1075; see
16 also Valenzuela v. Astrue, 2008 WL 477833 at *17 (D. Ariz.
17 2008)("[T]he ALJ's conclusion at step two that Plaintiff's depression
18 was not severe prevented later consideration as to whether Plaintiff's
19 limitations of mental functioning were sufficiently severe so as to
20 make the grids inapplicable at step five")(applying Hoopai v. Astrue).
21 Moreover, Plaintiff submitted no medical evidence of depression,
22 memory problems or limitations from Hepatitis C, and the ALJ
23 reasonably rejected Plaintiff's claim that he lacked ability to
24 communicate in English as not fully credible. Cf. Moore v. Apfel, 216
25 F.3d at 869 (finding that ALJ "correctly enlisted the help of a VE"
26 because the claimant had "both exertional and nonexertional
27 limitations"). A review of the record revealed no evidence of a
28 significant or sufficiently severe limitation calling into question

1 the ALJ's conclusion that Plaintiff is capable of performing a full
2 range of jobs in the medium work category. Accordingly, this claim
3 must be denied.

4 **V. ORDERS**

5 Accordingly, **IT IS ORDERED** that:

6 1. The decision of the Commissioner is **AFFIRMED**.

7 2. This action is **DISMISSED WITH PREJUDICE**.

8 3. The Clerk of the Court shall serve this Decision and Order
9 and the Judgment herein on all parties or counsel.

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11 DATED: November 6, 2009

12 _____/S/
13 CARLA M. WOEHRLE
14 United States Magistrate Judge
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